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04 UNITED STATES DISTRICT COURT
05 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

06 ALLAN PARMELEE,) CASE NO.: C06-1589-RSM
07)
07 Petitioner,)
08)
08 v.) REPORT AND RECOMMENDATION
09)
09 JEFFREY UTTECHT,)
10)
10 Respondent.)
11 _____)

12 Petitioner is a state prisoner who has submitted a *pro se* petition for a writ of habeas
13 corpus pursuant to 28 U.S.C. § 2254, along with an application to proceed *in forma pauperis*.
14 (Dkt. #1). The petition has not been served on respondent. For the reasons set forth below, the
15 Court recommends that the petition be dismissed without prejudice.

16 BACKGROUND

17 In 2004, petitioner was convicted in King County Superior Court of two counts of arson
18 and was sentenced to 24 years in prison. (Petition at 1). Petitioner's attempt to appeal his
19 conviction in state court apparently failed because, according to petitioner, the state court has
20 denied him leave to proceed *in forma pauperis*. (*Id.* at 6). In addition, petitioner appears to have
21 a personal restraint petition ("PRP") currently pending in the Washington Court of Appeals. (*Id.*
22 at 13, referring to *In re Parmelee*, Case No. 586505-I (Wash. Ct. App.)).

DISCUSSION

A federal district court is charged with reviewing a habeas petition prior to directing that it be served on respondent. *See* Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief, then the court must dismiss the petition. *Id.* In reviewing the instant habeas petition prior to directing that it be served on respondent, the court has determined that the petitioner is not entitled to relief and therefore recommends dismissal without prejudice.

Petitioner's habeas petition lists three grounds for relief¹: In his first ground, petitioner challenges the state court's denial of his request to proceed *in forma pauperis*. (Petition at 6). In his second ground for relief, petitioner asserts that he received ineffective assistance of counsel because his trial counsel failed to preserve certain errors for appellate review. (*Id.* at 9). Petitioner, however, does not identify specifically which errors counsel failed to preserve. In his third ground for relief, petitioner claims that he is currently being denied access to the courts by the Washington Department of Corrections.

Petitioner's first ground for relief, challenging the state court's denial of his *in forma pauperis* application, does not appear to be within the scope of habeas review. A determination by the state court that petitioner should not be permitted to proceed *in forma pauperis* falls outside the purview of the statute authorizing habeas petitions, which restricts such petitions to claims that a petitioner is "in custody in violation of the Constitution or laws or treaties of the

¹ Although the petition lists a total of three grounds for relief, they are not presented in the typical order. The first ground is presented under the heading "First Ground for Relief," while the second ground is listed under "Third Ground for Relief," and the third ground is set forth in paragraph #19 of the petition. (Petition at 7-8, 14).

01 United States.” 28 U.S.C. § 2254(a). Accordingly, petitioner’s first ground for relief should not
02 be allowed to proceed here.

03 Petitioner’s second ground for relief, alleging ineffective assistance of counsel, would be
04 cognizable on habeas review if it were presented in greater detail. Ordinarily, the court would
05 grant petitioner leave to amend his habeas petition to present the claim in greater detail; however,
06 here, it appears that because petitioner has a PRP currently pending in state court, he has failed
07 to exhaust his state remedies, a prerequisite to the filing of a habeas petition. *See* 28 U.S.C. §
08 2254(b). Even if the pending PRP raises different issues than the habeas petition presented here,
09 the Ninth Circuit has held that a federal habeas petitioner must await the outcome of any pending
10 state court challenges before a federal court may consider the petitioner to have exhausted his
11 state remedies. *See Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983); *Brown v. Maass*,
12 11 F.3d 914, 915 (9th Cir. 1993) (*per curiam*); *Schnepp v. Oregon*, 333 F.2d 288, 288 (9th Cir.
13 1964) (*per curiam*). Accordingly, petitioner’s second ground for relief should not proceed here
14 until the state court has disposed of petitioner’s PRP and petitioner has pursued all possible
15 appeals thereof.

16 Finally, petitioner’s third ground for relief, that he is being denied access to the courts,
17 must be brought pursuant to 42 U.S.C. § 1983 instead of 28 U.S.C. § 2254, because it is a
18 challenge to petitioner’s *conditions* of confinement, rather than to his *custody*. *See Preiser v.*
19 *Rodriguez*, 411 U.S. 475, 499 (1973). Accordingly, petitioner’s third ground for relief should not
20 be allowed to proceed here.²

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22 ² The court notes that petitioner recently had a similar “access to courts” claim dismissed
without prejudice by this court. *See Parmelee v. Carter*, Case No. C05-5646-RBL-KLS (Order

01 CONCLUSION

02 For the foregoing reasons, petitioner's petition for a writ of habeas corpus should be
03 dismissed without prejudice. In addition, petitioner's application for leave to proceed *in forma*
04 *pauperis* should be denied as moot. A proposed Order accompanies this Report and
05 Recommendation.

06 DATED this 9th day of November, 2006.

07 
08 Mary Alice Theiler
09 United States Magistrate Judge
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21 issued September 7, 2006). The court also notes that a bar order has been issued which prevents
22 petitioner from proceeding *in forma pauperis* in any non-habeas action filed in this district, unless
petitioner can show that he is "under imminent danger of physical injury." (Dkt. #8 in Case No.
C02-1467, at 2).